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Nos. 80-5049 & 80-54

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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CLIFFORD E. CLAYTON,
*Petitioner,*
v.

INTERNATIONAL UNION, UNITED AUTOMOBILE, AEROSPACE AND AGRICULTURAL IMPLEMENT WORKERS OF AMERICA (UAW) and its LOCAL 509,
*Respondents.*

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ITT GILFILLAN,
*Petitioner,*
v.

CLIFFORD E. CLAYTON,
*Respondent.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF FOR UAW & its LOCAL 509

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## COUNTERSTATEMENT OF THE QUESTION PRESENTED

A discharged employee's grievance is withdrawn from the contractual procedure, short of arbitration, by a low-level union official. The union's constitution provides for appeal of that decision, both to higher levels and to neutral independents. The employee does not initiate those remedies.

Is such an employee entitled to an instant and unencumbered opportunity to litigate in federal court, against both employer and union, or should the judiciary hold its hand until exhaustion of those remedies, or futility, is shown?

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## BRIEF FOR UAW & its LOCAL 509

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## OPINIONS BELOW

The opinions below are reported at: *Clayton* v. *ITT Gilfillan, UAW & Local 509*, 623 F. 2d 563 (9th Cir. 1980), 104 LRRM 2118, 88 CCH Lab. Cas. ¶ 12,009, *revising*, —— F. 2d —— (9th Cir. 1979), 102 LRRM 2190,

87 CCH Lab. Cas. ¶ 11,545.[1] As revised, the Circuit Court's opinion reversed in part, and affirmed in part, the unreported decision of the District Court,[2] which entered judgment in favor of ITT Gilfillan and the UAW.[3]

## COUNTERSTATEMENT OF THE CASE

Clayton was discharged by ITT Gilfillan in 1975 for violation of a shop rule against lewd, indecent and immoral behavior in the plant.[4] Under the "management

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[1] *Reprinted* in Appendix to ITT Gilfillan's Petition, hereafter "Pet. App." That Appendix is not consecutively paginated. Accordingly, we cite documents in that Appendix by title and page within the item, *e.g.*, "Finding of Fact No. 1, Pet. App. 2" will refer to page 2 of the Findings of Fact, as reprinted in the Appendix to ITT Gilfillan's Petition. The Joint Appendix will be cited "J.A." The Record will be cited "R. 15". The trial transcript will be cited "Tr. 63".

[2] The District Court's Findings of Fact and Conclusions of Law are reprinted at Pet. App. 1-18.

[3] The full name of the parties appears in the caption. "UAW" or "Union" will refer to both the International Union and its Local 509, unless otherwise indicated by the context. When only one of the union defendants is intended, the reference will be to the "International Union" or to "Local 509".

[4] Finding of Fact No. 4, Pet. App. at 3-4. The rule itself provides: "Violations for which the employee will be suspended with a recommendation for discharge pending results of an investigation include, but are not limited to the following . . . (4) Immoral or indecent conduct". J.A. 79. Mr. Clayton's precise behavior is not detailed in this record. Suffice it that the conduct in question was neither genteel nor easily overlooked. *C.f. Geiler* v. *Comm. on Judicial Qualifications*, 10 C. 3d 270, 277-78 n. 6, 284 (1973) (*en banc*); and *e.g.*, *Tomkins* v. *Public Service Electric & Gas Co.*, 568 F.2d 1044 (3d Cir. 1977), and *Barnes* v. *Costle*, 561 F.2d 983 (D.C. Cir. 1977). Yet it is easily more relevant here than his race, a matter about which, despite counsel's recitations, Clayton's Brief at 19, 22 n. 12, the record is just as silent.

rights" clause of the labor agreement, ITT Gilfillan retained the right to promulgate and enforce such rules.[5]

A timely grievance was filed under the labor agreement,[6] and processed, without success, through Step III.[7] The Union filed a timely request for arbitration but, on further consideration, decided not to arbitrate, and so notified Clayton.[8] The International Representative responsible for servicing Local 509, Mr. Gazzigli, was very specific about his reasons: Clayton's version of the incident directly conflicted with that of two eye witnesses; none of the others present would corroborate Clayton's version; Clayton was, as a Steward,[9] well aware of the Shop Rule; and the UAW would not condone such conduct.[10] In short, Gazzigli believed he had done his best, and could not win at arbitration.[11]

Clayton unsuccessfully filed charges with the N.L.R.B., E.E.O.C., and California Fair Employment Practices

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[5] ITT Gilfillan—UAW Agreement, Article II, *reprinted* at J.A. 30-31.

[6] Articles VIII & IX, *reprinted* at J.A. 31-36.

[7] Finding of Fact No. 6, Pet. App. 4. Step III is the last step of the grievance procedure short of arbitration, *see* Agreement, Art. IX § 1, at J.A. 35.

[8] Finding of Fact No. 6, Pet. App. 4.

[9] Clayton's Brief at 10.

[10] Letter, Gazzigli to McCracken, copy to Clayton, dated July 11, 1975, *reprinted* at J.A. 78, *see also* Gazzigli's testimony, Tr. 89, 92. The Ninth Circuit's incidental comment that the reasons for Gazzigli's action are "not stated in the record", 623 F.2d 563, 565, 571 (9th Cir. 1980), Pet. App. 4, 26, is in error. *See*: ¶ 17 of First Amended Complaint, incorporating letter as Exh. C, R. 38 & 125-26, J.A. 7; Exh. B to Affidavit of Clifford Clayton, R. 27-30; R. 367-68; and R. 398, ln. 28, referring to Plaintiff's Exh. 3, admitted at Tr. 192 ln. 9.

[11] Tr. 113, 92.

Commission.[12] Represented by counsel, he filed and litigated a claim for unemployment benefits, during July and August, 1975.[13]

Clayton then filed this action in the Central District of California, alleging breach of contract by ITT Gilfillan, and of the duty of fair representation by the UAW and Local 509.[14] While the Complaint alleges arbitrary, invidious and discriminatory action by the Union,[15] after trial, Clayton abandoned the latter two. His only claim against the UAW is "arbitrary" or "perfunctory" action by Gazzigli on the grievance.[16]

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[12] Finding of Fact No. 11(a) & (b), Pet. App. 8-9.

[13] Finding of Fact No. 11(c), Pet. App. 9-10.

[14] As to ITT Gilfillan, jurisdiction is under § 301(a) & (c) of the Labor Management Reations Act (LMRA), commonly known as "Taft-Hartley", 29 U.S.C. § 185(a) & (c), *reprinted* in Clayton's Brief at 2-3. As to the UAW, however, jurisdiction is under 28 U.S.C. § 1337, to enforce a right implied by this Court into § 9(a) of the National Labor Relations Act (NLRA), *as amended*, 29 U.S.C. § 159(a), since that Act regulates interstate commerce. On this point, the District Court is correct, Conclusion of Law No. 2, Pet. App. 12, and Clayton is wrong, Clayton's Brief at 2, First Amended Complaint ¶ 1, R. 33, J.A. 3, Second Amended Complaint ¶ 1, R. 274. *Vaca* v. *Sipes*, 386 U.S. 171, 177 (1967); *Humphrey* v. *Moore*, 375 U.S. 335, 356-57 (1964) (Goldberg, J., *concurring*). Otherwise the duty of fair representation would expire with the labor agreement.

[15] First Amended Complaint, ¶ 15, J.A. 6, R. 37; Second Amended Complaint, ¶ 15, R. 278.

[16] Plaintiff's Objections to Proposed Findings of Fact and Conclusions of Law, at 4, R. 383 lns. 17-26: "There is no evidence that plaintiff's claim was to the effect that Gazzigli's decision not to arbitrate his discharge grievance was based on or a result of fraud, discrimination or collusion with management. The evidence is plain and undisputed that plaintiff's claim is now, and always has been, that the refusal to take his discharge grievance to arbitration resulted from 'arbitrary' action by Gazzigli, as that term is defined in the decided cases—*i.e.*, 'perfuntory', not based on

By agreement, the trial was trifurcated by issue: *first*, exhaustion of remedies under the UAW CONSTITUTION; *second*, fair representation; and *third*, breach of contract.[17]

After trial of the first stage, the District Court entered judgment for both ITT Gilfillan and the UAW because Clayton failed even to initiate remedies available to him under the UAW CONSTITUTION.[18] Crediting Gazzigli and other defense evidence rather than Clayton,[19] the trial court found:[20] Articles 32 and 33 of the UAW CONSTITUTION provide remedies to individuals who are aggrieved by actions of the UAW or its representatives.[21] It was stipulated that Clayton failed to initiate, let alone exhaust, these remedies. Although these remedies were available to him, Clayton did not go either to the membership of Local 509, the UAW's International Executive Board (I.E.B.),[22] the Public Review Board

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a consideration of 'relevant, permissible union standards,' *Vaca* v. *Sipes*, 386 U.S. 171, 190, 191 . . . (1967) . . ." Counsel repeats the point again at 6, R. 385 lns. 23-26, and at 7, R. 386 lns. 12-15.

[17] Pre-Trial Conference Order, IV, J.A. 21.

[18] Conclusions of Law, 3-8, Pet. App. 12-17; Judgment, J.A. 114-15, R. 408-9. The District Court's explanation from the bench is at Tr. 300-304.

[19] Tr. 300 lns. 17-21. The disputed issues were essentially limited to whether Clayton was informed of his remedies, how, and when. Since he did not attempt to use the remedies, he had no independent evidence (as opposed to argument) on their nature, availability, or adequacy.

[20] Findings of Fact, Nos. 7-14, Pet. App. 5-11.

[21] Article 33 is the general provision governing appeals. Article 32 deals specifically with the Public Review Board (P.R.B.). *See*, respectively, J.A. 69-77, and 64-69; and note 23 *infra*.

[22] The I.E.B. is analogous to the Board of Directors of a corporation, but elected by the Delegates to the UAW's triennial Constitutional Convention, rather than stockholders. UAW CONSTITUTION, Art. 7 § 1(b), R. 80; Art. 10, R. 84-86.

(P.R.B.),[23] or the Convention Appeals Committee (C.A.C.).[24] Clayton was specifically advised above these remedies by his Local.[25] Like other members, he also received SOLIDARITY, the UAW's newspaper, by mail. It regularly contained articles about the appeal procedure, including the P.R.B.'s telephone number for questions.[26]

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[23] The P.R.B. is, as the name suggests, a body of seven "impartial persons of good public repute", independent of the UAW, established in 1957 as an institutional "Supreme Court". UAW CONSTITUTION, Art. 32 §§ 1-3, J.A. 64-65; *see generally*, Exh. 9, J.A. 83-86; and *Baldini* v. *UAW Local 1095*, 581 F.2d 145, 149 (7th Cir. 1978). The P.R.B.'s membership, at the relevant time, included, *e.g.*, Theodore J. St. Antoine, then Dean of the University of Michigan Law School, Frank W. McCulloch, then Professor of Law at the University of Virginia, and formerly Chairman of the N.L.R.B., and Harry W. Arthurs, Dean of the Law School at York University in Toronto. J.A. 85-86. Past members include R. W. Fleming, then Professor of Law at the University of Wisconsin, more recently President of the University of Michigan; and Wade H. McCree, Jr., subsequently Circuit Judge and Solicitor General. J.A. 100, 89.

The P.R.B. determines its own budget, which the UAW must fund. Art. 32 § 9, J.A. 68-69. It maintains separate offices, and hires its own staff. Art. 32 § 9, J.A. 69, and *see* J.A. 84. It is self-perpetuating, as the remaining members nominate the replacement in the event of a vacancy. Art. 32 § 2, J.A. 64.

[24] The C.A.C. originated as a standing committee of the UAW Constitutional Convention, selected by lot from the elected Delegates. Art. 33 § 8, J.A. 73-74. It has the appellate authority of the Convention itself, which is supreme under the UAW CONSTITUTION. Art. 7 § 1(a), R. 213. Conflicts between the P.R.B. and C.A.C. do not arise because appellants from the I.E.B. must appeal to one *or* the other. Art. 33 §§ 8 & 9, J.A. 73-75. For their own reasons, some appellants prefer to appeal to an "outside" tribunal (the P.R.B.), rather than an "inside" one (the C.A.C.), or *vice versa*. Thus *both* the P.R.B. and C.A.C. have "final" authority in the UAW's appeal structure.

[25] Finding of Fact No. 8, Pet. App. 6-7.

[26] Finding of Fact No. 9, Pet. App. 7-8. An example article is *reprinted* at J.A. 83-88.

Clayton had previously participated in another's appeal to the Local's membership,[27] and had been a Steward of the Local for the previous 8 years.[28] Clayton was represented by counsel during the period when a timely appeal could have been filed.[29]

Assuming *arguendo* that defendants had the burden, the trial court found that, by a preponderance, the UAW had established the remedies' availability and adequacy, Clayton's failure to exhaust, and the *absence* of futility.[30] These findings are well supported. No evidence of futility or a preordained result was introduced.[31] The various bodies had unquestioned authority over the relevant UAW agents,[32] as well as the right to make Clayton whole with

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[27] Finding of Fact No. 10, Pet. App. 8.

[28] Clayton's Brief at 10.

[29] Finding of Fact No. 12, Pet. App. 10. That attorney advised Clayton to seek more expert advice on his labor law problems, but Clayton did not. *Id.* Nor did Clayton's current counsel, employed shortly thereafter, ask for an extension of the filing periods in the UAW CONSTITUTION.

[30] Conclusions of Law, at 18 n. 1, Pet. App. 18 n. 1; Finding of Fact No. 14, Pet. App. 11. This is a burden which the UAW does not accept, since, absent an appeal, there can only be general evidence on these issues. *Only* Clayton could initiate an appeal, occasioning specific evidence, if any, which might instantiate the arguments his counsel now advances.

[31] Finding of Fact No. 14, Pet. App. 11; Conclusion of Law No. 7, Pet. App. 15.

[32] The authority of the membership, the I.E.B., and the C.A.C. is plenary and, we assume, not seriously disputed here. *See*: UAW CONSTITUTION, Art. 38 § 6, R. 246; Art. 14 § 5, R. 224; Art. 12 § 1, R. 220; Art. 7 § 1, R. 213. The decisions of the C.A.C. and P.R.B. are, under Art. 33 § 8, J.A. 73-74, and Art. 32 § 3, J.A. 64-65, "final and binding".

money damages.[33] Due process is protected at each step of the appellate route.[34]

On appeal, the Ninth Circuit's revised opinion affirmed as to the UAW, but reversed as to ITT Gilfillan, holding that the employer was not protected by the exhaustion defense. The Circuit rejected Clayton's inadequacy arguments:

> The ability to award only money damages does not make the process inadequate: relief against the union in the civil action Clayton now brings would give him no more.
>
> * * * *
>
> Clayton failed to give his union the opportunity to reverse itself. He cannot obtain by judgment now what he would not allow the union an opportunity to afford him under its constitution. [623 F. 2d 563, 566 & 567, Pet. App. 8, 10-11]

This Court granted *certiorari* on ITT Gilfillan's Petition and Clayton's Petition, —— U.S. —— (1980), 49 U.S.L.W. 3332.

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[33] The P.R.B.'s ability on this score is a specific finding. Finding of Fact No. 13, Pet. App. 10-11. The record contains two P.R.B. decisions where such awards were, in fact, made. J.A. 89-109. Clayton contests the adequacy of those awards. Clayton's Brief at 7-8, 18-24. However, he offered no evidence that the P.R.B., let alone the other bodies, *cannot* make broader damage awards. Their broad remedial authority, if anything, suggests the contrary. In any event, that authority, both exercised and potential, *exceeds* that allowed federal courts, in the ordinary case, under *Vaca* v. *Sipes*, 386 U.S. 171, 196-97 (1967), and *Czosek* v. *O'Mara*, 397 U.S. 25, 29 (1970), and *see* even Justice Stewart's concurrence in *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 572 (1976). Nor can one seriously argue that the I.E.B.'s or C.A.C.'s authority over the UAW's treasury is constrained in any fashion relevant here.

[34] Like any member, an aggrieved individual has the right to present his appeal to the membership of his Local. On appeal to the I.E.B. and C.A.C., he has the right to be present, to have counsel,

## SUMMARY OF ARGUMENT

Exhaustion of intra-union remedies, like exhaustion of the collectively-bargained grievance procedure, furthers federal labor policies of minimal judicial entanglement in industrial and union self-government, private and speedy dispute resolution, and the preservation of peace and stability in labor-related matters.

As with the analogous doctrine of exhaustion of administrative remedies, the requirement that an employee must "afford the union an opportunity to act on his behalf" conserves judicial resources, while providing unions with a "fair opportunity to function" within their sphere of expertise.

Neither of the two generally recognized exceptions to this doctrine apply here. The UAW's remedies far surpass minimum standards of adequacy. Clayton should not be heard to speculate that a union appeals system, which he refused to test, is somehow lacking. Nor, on this record, is there reason to believe that any UAW tribunal would have hostilely prejudged his claims against lower-level union officials, or left him without a sufficient remedy. The trial court found the contrary.

Clayton demands an instant and unencumbered right to litigate his discharge in federal court. Prudent restraint, no less than settled federal labor policy, requires this Court to decline that invitation. The courts should hold their hands, absent exhaustion of remedies, or a

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to present materials, and, in most non-trivial cases, to have a hearing. UAW CONSTITUTION, Art. 33 § 4, J.A. 70. The P.R.B. establishes its own procedural rules, Art. 33 § 10, J.A. 75-76, Art. 32 § 6, J.A. 67, and holds hearings near the locale of the appellant. J.A. 84. There is a formal record, Art. 33 §§ 6 & 10, J.A. 71, 75-76, notice, hearing, and a right to counsel. Art. 33 § 4, J.A. 70. The result, throughout the system, probably equals, if not exceeds, the level of due process commonly found before labor arbitrators and administrative agencies.

showing of futility. As to the UAW, the decision below should be *affirmed.*

* * * *

## ARGUMENT

Federal labor policy has long been premised on the wisdom of private dispute resolution in industrial life and union affairs. Judicial restraint, coupled with minimal intrusion into the affairs of employers, unions and their collective bargaining relationships, has been the customary means to that end. The requirement that internal union remedies be exhausted as a prerequisite to litigation by an employee against his or her union sensibly furthers this Congressionally-sanctioned, private industrial justice system.

Internal union remedies contribute to higher quality union grievance handling, union democracy, rapid resolution of employees' disputes, and so, to industrial peace and stability. Employees are often able to resolve their claims before union tribunals, which, like their unions, interpret and apply labor agreements as part of their daily business, thereby conserving scarce judicial resources.

Exhaustion of internal union remedies must remain a strict prerequisite to suit, as dictated by federal labor policy. The exceptions for inadequate remedies or futile situations must remain sharply delimited, and narrowly construed, so as not to swallow the rule. In the instant case, the Courts below properly applied the exhaustion requirements, and correctly held that the evidence supported the only possible conclusion: the UAW's remedies were available, adequate, and not futile.

### I

Congressional support for industrial self-government is declared in § 203(d) of the LMRA, 29 U.S.C. § 173(d): "Final adjustment by a method agreed upon by the

parties is hereby declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective bargaining agreement . . ."

In *Textile Workers Union* v. *Lincoln Mills*, 353 U.S. 448, 456, 457 (1957), the Court held that § 301 of the LMRA could be used by a union to compel compliance with the grievance arbitration procedure of a labor agreement, and mandated the development of a federal common law in enforcing these private arrangements.

*United Steelworkers of Am.* v. *Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960), described collectively-bargained grievance and arbitration provisions as "a major factor in achieving industrial peace", and declared that "[t]he present federal policy is to promote industrial stabilization through the collective bargaining agreement." 363 U.S. at 578. Observing that "[i]n the context of the plant or industry the grievance may assume proportions of which judges are ignorant", this Court sharply limited the role of the judiciary to "ascertaining whether the party seeking arbitration is making a claim which on its face is governed by the contract." *United Steelworkers of Am.* v. *American Mfg. Co.*, 363 U.S. 564, 567, 568 (1960); and *United Steelworkers of Am.* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593, 599 (1960).

Doubts should be resolved in favor of arbitrability, because "[t]he ablest judge cannot be expected to bring the same experience and competence [as the arbitrator] to bear upon the determination of a grievance, because he cannot be similarly informed." *Warrior & Gulf Navigation Co., supra*, 363 U.S. at 582-83. Overall industrial self-government is characterized as follows:

> The collective bargaining agreement states the rights and duties of the parties. It is more than a contract;

> it is a generalized code to govern a myriad of cases which the draftsmen cannot wholly anticipate. (citation omitted) The collective agreement covers the whole employment relationship. It calls into being a new common law—the common law of a particular industry or of a particular plant. [*Id.*, 363 U.S. at 578-579.]
>
> * * * *
>
> [A] collective bargaining agreement is an effort to erect a system of industrial self-government . . . Gaps may be left to be filled in by reference to the practices of the particular industry and of the various shops covered by the agreement. [*Id.*, 363 U.S. at 580.]
>
> * * * *
>
> [T]he grievance machinery under a collective bargaining agreement is at the very heart of the system of industrial self-government. Arbitration is the means of solving the unforseeable by molding a system of private law for all the problems which may arise and to provide for their solution in a way which will generally accord with the variant needs and desires of the parties. The processing of disputes through the grievance machinery is actually a vehicle by which meaning and context are given to the collective bargaining agreement. [*Id.*, 363 U.S. at 581.][35]

Not only must the employer and union avoid litigation in favor of their private justice system, individual em-

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[35] *Accord, Gateway Coal Co.* v. *United Mine Workers of Am.*, 414 U.S. 368, 377-379 (1974); and *Wiley* v. *Livingston*, 376 U.S. 543, 550 (1964): "Central to the peculiar status and function of a collective bargaining agreement is the fact, dictated both by circumstances . . . and by the requirements of the National Labor Relations Act, that it is not in any real sense the simple product of a consensual relationship. Therefore, although the duty to arbitrate . . . must be founded on a contract, the impressive policy considerations favoring arbitration are not wholly overborn by the fact that Wiley did not sign the contract being construed."

ployees must too. An individual must exhaust the contractual grievance procedure prior to litigation. *Republic Steel Corp.* v. *Maddox*, 379 U.S. 650 (1965). The dispositive considerations, equally applicable here, are those of federal labor policy:

> The employee must afford the union the opportunity to act on his behalf. Congress has expressly approved contract grievance procedures as a preferred method for settling disputes and stabilizing the "common law" of the plant. LMRA § 203(d), 29 U.S.C. § 173(d); § 201(c), 29 U.S.C. § 171(c). . . . Union interest in prosecuting employee grievances is clear. Such activity complements the union's status as exclusive bargaining representative by permitting it to participate actively in the continuing administration of the contract. In addition, conscientious handling of grievance claims will enhance the union's prestige with employees. Employer interests, for their part, are served by limiting the choice of remedies available to aggrieved employees. . . .
>
> *A contrary rule which would permit an individual employee to completely sidestep available grievance procedures in favor of a lawsuit has little to commend it.* [379 U.S. at 653 (emphasis supplied)]

The Congressional view of the desirability of industrial expertise as the alternative to judicial involvement in labor-related matters is amply evidenced in the broad legislative framework, bolstering free collective bargaining and private dispute-settlement mechanisms. Moreover, a broad pre-emption doctrine restricts judicial jurisdiction in much of the labor area, save fair representation, *e.g.*, *Amalgamated Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971):

> The rationale for pre-emption, then, rests in large measure upon our determination that when it set down a federal labor policy Congress plainly meant to do more than simply to alter the then-prevailing

> substantive law. It sought as well to restructure fundamentally the processes for effectuating that policy, deliberately placing the responsibility for applying and developing this comprehensive legal system in the hands of an expert administrative body rather than the federalized judicial system. [403 U.S. at 288]

## II

The fair representation doctrine itself is a judicially-created exception to the overall legislative scheme of private, collectively-bargained, industrial justice. To protect unionized employees, initially against race discrimination, *see, e.g., Steele* v. *Louisville & Nashville R.R. Co.*, 323 U.S. 192 (1944); *Tunstall* v. *Brotherhood of Locomotive Firemen*, 323 U.S. 210 (1944), and later, against other forms of arbitrary, discriminatory or bad faith handling of their grievances, the Court evolved a limited exception to the exclusive, final and binding nature of the collectively-bargained procedures. *See, Hines* v. *Anchor Motor Freight*, 424 U.S. 554 (1976); *Amalgamated Motor Coach Employees* v. *Lockridge*, 403 U.S. 274 (1971); *Vaca* v. *Sipes*, 386 U.S. 171 (1967); *Humphrey* v. *Moore*, 375 U.S. 335 (1964); *Ford Motor Co.* v. *Huffman*, 345 U.S. 330 (1953).[36]

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[36] Plaintiff misconceives the nature of an individual employee's rights. The union's rights under a collective bargaining agreement, and the employee's derivative rights thereunder, are purely private contract rights. An employee has no *public* right to have his or her grievance arbitrated. Moreover, the employee has no such *private* right. To the contrary, so long as the union has a rational, non-arbitrary basis for doing so, and absent discrimination, hostility or other bad faith, the union remains free to decide to withdraw even a clearly meritorious grievance. *Vaca* v. *Sipes, supra*, 386 U.S. at 191-92; *Humphrey* v. *Moore, supra*, 375 U.S. at 349-50. This might occur, for example, where an otherwise proper grievance involves a matter of minor significance, or precedential value, compared to the cost of arbitration. The old precept that the quickest way to lose a weak case is to try it, applies equally well to arbitration. There

In those situations,[37] this doctrine permits bargaining unit members the right to obtain relief in federal court against their employer on the breach of collective bargaining agreement claim, where the union has been shown to have failed to meet its duty.

## III

To minimize the intrusion of this exception upon industrial self-government, early on lower federal courts required exhaustion of the union's internal remedies as a prerequisite to litigation. *See, Neal* v. *System Board of Adjustment*, 348 F. 2d 722, 726-27 (8th Cir. 1965), and cases cited therein. This Court, in *NLRB* v. *Industrial Union of Marine & Shipbuilding Workers*, 391 U.S. 418 (1968), characterized the policy behind the exhaustion doctrine as creating "in this labor field a regime comparable to that which prevails in other areas of law before the federal courts, which often stay their hands while a

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is no profit, to either management or to the bargaining unit, in having one's representative create adverse arbitration precedent. Negotiations, compromise, and, if necessary, a realistic concession, are the marks of bargaining maturity for both sides of the table. This, of course, is not news to either Congress or this Court. *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 567 (1976).

[37] As noted *supra*, n. 16, Clayton's only remaining allegation of a breach of the duty of fair representation is that the refusal to arbitration was "arbitrary" or "perfunctory". Despite the Ninth Circuit's inexplicable oversight, *supra*, n. 10, it is clear, on the face of this record, that Clayton cannot show such conduct. Gazzigli's action was taken for stated, relevant and justifiable reasons, *supra*, n. 10 and accompanying text. Whether he was right or wrong is not material here. His action clearly falls within the "wide range of reasonableness" allowed the UAW. *Ford Motor Co.* v. *Huffman*, 345 U.S. 330, 349 (1953); *Hines* v. *Anchor Motor Freight*, 424 U.S. 554, 567 (1976). The Ninth Circuit may be affirmed, as to the UAW, on the alternative ground that, as a matter of law, there was no breach of the duty here. *Dandridge* v. *Williams*, 397 U.S. 471, 475-76, n. 6 (1970).

litigant seeks administrative relief before the appropriate agency." [38] 391 U.S. at 426.

The same values involved in the contractual grievance procedure are served by the internal union remedies:

> [T]here is a basic underlying principle involved here, upon which much of labor-management harmony turns, namely, staying the hand of "judicial interference with the internal affairs of a labor organization until it has had at least some opportunity to resolve disputes concerning its own internal affairs."

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[38] Clayton argues that the exhaustion doctrine, if any, should be limited by an inflexible four month deadline, in large part because of the first proviso to § 101(a)(4) of the Labor-Management Reporting & Discolsure Act (LMRDA), 29 U.S.C. § 411(a)(4), and Justice Douglas' *dicta* for the Court in *Marine Shipbuilding, supra.* Clayton's Brief at 24-26. There are at least two sufficient responses:

The first is Justice Harlan's: "[I]t is appropriate to emphasize that courts and agencies will frustrate an important purpose of the 1959 legislation [LMRDA] if they do not, in fact, regularly compel union members 'to exhaust reasonable hearing procedures' within the union organization. Responsible union self-government demands, among other prerequisites, a fair opportunity to function." 391 U.S. at 429 (Harlan, J., *concurring*) (citation omitted). What is a "fair opportunity" necessarily varies with the facts, and should properly be committed to the discretion of the lower courts. Uniformly, and not surprisingly, that discretion is exercised against litigants who have the sole ability to begin the process, but, as here, refuse to do so.

The second response is that § 101(a)(4)'s proviso, by its own terms, constrains only "a labor organization", not the judiciary. 105 CONG. REC. 17899 (remarks of Sen. Kennedy). Senator Kennedy further explained that the proviso was not intended "to invalidate the considerable body of state and federal court decisions of many years standing which require, or do not require, the exhaustion of internal remedies prior to court intervention depending upon the reasonableness of such requirements in terms of the facts and circumstances of a particular case." 105 CONG. REC. 17899 (remarks of Sen. Kennedy), *quoted in Marine Shipbuilding, supra,* 391 U.S. at 428. Nowhere does *Marine Shipbuilding* conclude that the federal courts are limited by the four month proviso. 391 U.S. at 428.

*Brady* v. *Trans World Airlines Inc.*, 401 F. 2d 87 (3rd Cir. 1968) . . . [*Imel* v. *Zohn*, 481 F. 2d 181, 183 (10th Cir. 1973)][39]

The internal exhaustion requirement serves critical interests of all parties. It contributes to union democracy, industrial peace and stability, and a more rapid dispute resolution. It conserves judicial resources by either wholly disposing of the case, *or* at a minimum, narrowing and focusing the issues through the union's collective bargaining expertise. Exhaustion may reveal misconduct by union officials, and induce the union to reverse itself, completely eliminating the burden, delay and expense of litigation against the union. Or exhaustion may establish the *bona fides* of the union's representation to the grievant's own satisfaction, again obviating any further proceedings. Finally, should litigation follow, the factual and contractual picture may well have been clarified, with consequent savings in judicial resources. "The national labor policy in favor of private dispute resolution is served by requiring complaints to be processed outside the courts whenever there is an effective process available," *Varra* v. *Dillon Companies*, 615 F. 2d 1315, 1317-18 (10th Cir. 1980).

"The reason for this [exhaustion] requirement is that intra-union remedies are part and parcel of the industrial in-house procedure for settling labor disputes. The primary benefit of requiring initial submission of employee complaints against a union that refuses to help process a grievance against a company is that internal machinery can settle differences short of court action." *Ruzicka* v. *General Motors Corp.*, 523 F. 2d 306, 311 (6th Cir. 1975). It is "bottomed on the hope that such procedures will quickly resolve disputes without the delay inherent in the judicial process and with the aid of persons ex-

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[39] *Accord, Varra* v. *Dillon Companies*, 615 F.2d 1315 (10th Cir. 1980); *Willetts* v. *Ford Motor Co.*, 583 F.2d 852 (6th Cir. 1978).

perienced at resolving member-union conflicts short of a full-blown judicial proceeding". *Id.* at 312.[40]

Even if the union hearing does not fully resolve the matter, it may narrow and clarify the issues, which "may well assist the court when it is later called upon to resolve the controversy", *Detroy* v. *Am. Guild of Variety Artists*, 286 F. 2d 75 (2d Cir. 1961). "Another justification for the doctrine is, of course, conservation of judicial resources."[41] *Buzzard* v. *IAM*, 480 F. 2d 35, 41-42 (9th Cir. 1973).

Exhaustion also promotes union democracy and self-government, as well as the broader policy of non-interference with the private adjustment of grievances and with internal union affairs. Of course, the union's incentive to maintain due process tribunals would be significantly undermined were individuals free to by-pass the union's constitutional procedures.[42] *See, e.g., Battle*

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[40] Some employers and unions have, through collective bargaining, agreed to allow the reinstatement of withdrawn grievances where a union tribunal reverses the union's initial decision. This is true, for example, in the current UAW contracts with the major automobile and agricultural implement manufacturers. Exhaustion of remedies, in those circumstances, falls squarely within *Republic Steel Corp.* v. *Maddox, supra,* as the procedures under the union's constitution have, in reality, become incorporated as a part of the contractual grievance procedure.

[41] The potential burden here should not be lightly underestimated. As the Court noted in *Vaca, supra,* 386 U.S. at 192 n. 15, more than 95% of written grievances are resolved by the parties short of arbitration. Since negotiation begets compromise, the grievant is often not fully satisfied. *Ford Motor Co. v. Huffman,* 345 U.S. 330, 349 (1953).

[42] "If a grievance procedure cannot be made exclusive, it loses much of its desirability as a method of settlement," *Republic Steel Corp.* v. *Maddox, supra,* 379 U.S. at 653. Analogously, union remedial procedures lose much of their viability if their usage is not mandatory, at least to the extent of being a prerequisite to litigation.

v. *Clark Equipment Co.*, 579 F. 2d 1338 (7th Cir. 1978); *Imel* v. *Zohn*, *supra*; and *Brady* v. *Trans World Airlines*, 401 F. 2d 87 (3d Cir. 1968).[43]

## IV

Generally, only two excuses have been judicially accepted for failure to exhaust internal union appeals procedures. The first is lack of availability of an adequate procedural route, an issue clearly not present here. The UAW's remedies have been held adequate in a wide variety of cases. *See, e.g., Battle* v. *Clark Equipment Co., supra*; *Newgent* v. *Modine Mfg. Co.*, 495 F. 2d 919 (7th Cir. 1977). The remedial schemes in the UAW CONSTITUTION and the record here thoroughly demonstrate adequacy.[44] The District Court plainly did not abuse its discretion, or commit clear error in so holding.

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[43] Contrary to Clayton's assertions, internal union tribunals have been uniformly viewed by the courts as an appropriate forum for resolution of claims that a union breached its fair representation duty both in negotiation and administration of a collective bargaining agreement. *See, e.g., Battle* v. *Clark Equipment Co.*, 579 F.2d 1338, 1343-1344 (7th Cir. 1978) (negotiation); *Keppard* v. *International Harvester Co.*, 581 F.2d 764 (9th Cir. 1978) (grievance handling); *Brady* v. *Trans World Airlines*, 401 F.2d 87, 104 (3rd Cir. 1968) (grievance handling); *Neal* v. *System Board of Adjustment, supra* (negotiation and administration of agreement). In particular, in cases such as *Brady, supra*, the fairness and adequacy with which a union handles a member's grievance has been characterized as the epitome of union-employee issues, rather than employer-union-employee issues or general public issues. Not even allegations of racial discrimination have been viewed as sufficient to generally excuse exhaustion of internal union remedies, *see, Neal* v. *System Board of Adjustment, supra*, 348 F.2d at 726-27.

[44] Clayton argues that the UAW's remedies are facially inadequate because they cannot guarantee a remedy within four months. Clayton's Brief at 24-28. This is premised upon, and supplements his contention that the lower courts should be denied *all* discretion on this issue, and that, once the inflexible four months has passed, the merits must be tried in federal court. The short answer is that, since Clayton never made *any* internal appeal, the issue cannot be

The second excuse is futility. The UAW's remedies cannot be described as "futile". Generally, a remedy is held to be futile because it is controlled or dominated by the same, allegedly hostile people who the aggrieved employee claims caused the injury. *See, e.g., Glover* v. *St. Louis-San Francisco Ry. Co.*, 393 U.S. 324, 330 (1969); *Varra, supra*; *Willetts* v. *Ford Motor Co.*, 583 F. 2d 852 (6th Cir. 1978). Specific proof of actual animus is normally held to be necessary. Otherwise, the same general allegations of union hostility, typically pled to claim a breach of the duty of fair representation, would automatically suffice to avoid the exhaustion prerequisite, making the requirement nugatory.

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raised on this record, except by speculation. *Any* time limit would defeat Clayton.

In any event, Clayton's guesses are wrong. He admits that an I.E.B. decision comes in 105 days, *or less*. Clayton's Brief at 25. But, more generally, *whatever* the filing deadlines, any appellate procedure is necessarily at the mercy of how fast the parties do their part. *E.g.*, if Clayton were himself to file on day #2, rather than day #30 of a 30-day appeal period, the process would be shortened by 28 days. The same point applies, with cumulative effect, at each step.

As for the P.R.B., it sets its own schedule and hearings. A principal value of the P.R.B. is its *independence*. A rigid time limit, rather than trial court discretion, would strongly discourage such independence, and likely be at its direct expense.

The C.A.C. meets every six months, hearing all cases appealed to it during that period, for the practical reason that it consists of Delegates from all over the United States and Canada. The difficulty and expense of bringing them all to Detroit makes that schedule reasonable. Moreover, it is the appellant who elects to appeal to the C.A.C. instead of its alternative, the P.R.B. In any event, six months is an *outside* limit. There is an equal probability that an appeal will get docketed just before the next scheduled session.

Finally, the more due process you guarantee, the more delay is possible. The UAW's procedure is laced with due process and is therefore all the more susceptible to *litigant-generated* due process delays. Taking away lower court discretion by fixing an automatic limit would be at the expense of due process, perhaps in the hard cases which need it most.

In *Republic Steel Corp.* v. *Maddox*, *supra*, 379 U.S. at 653, this Court observed: "It cannot be said, in the normal situation, that contract grievance procedures are inadequate to protect the interests of an aggrieved employee until the employee has attempted to implement the procedures and found them so." The same applies with equal force to a union's justice system. As the Court below concluded, Clayton should not be heard to speculate in a vacuum, why procedures he *completely* failed to use might not have provided him with whatever relief (he now alleges) would be required *were* he to establish unfair representation *and* a contract violation.

The District Court correctly found that Clayton failed to exhaust the UAW's fair and adequate remedies, and indeed wholly failed to even invoke them.

## CONCLUSION

For the foregoing reasons, the Court should *affirm* that portion of the judgment below in favor of the UAW and its Local 509.

Respectfully submitted,

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